IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Writ Petition No.2110 of 2006

Prafulla Maheshwari & ors. Petitioners
Vs.
State of Maharashtra & anr. Respondents

Mr.Anand Kumar and Mr.D.A.Jahangir for petitioenrs.
Mr.Tanvir Shaikh for resp.no.2.
Mrs.S.V.Gajare, APP for State.

CORAM: B.H.MARLAPALLE, J.
November 1, 2007.

ORAL JUDGMENT:

1. This petition filed under Article 227 of the Constitution read with Section 482 of Cr.P.C. prays for quashing the proceedings in C.C. No.403/SS of 2005 filed by the present respondent no.2 under Section 138 of the Negotiable Instruments Act, 1881. The petition was admitted and by way of interim relief the proceedings in the said complaint pending before learned Metropolitan Magistrate, 21st Court at Bandra were stayed by an ex-parte order dated 3/10/2006. The respondent no.2, therefore, filed Criminal Application No.287 of 2007 praying for vacating the ex-parte order of interim relief. By consent of the parties the petition has been taken up for final hearing today.

2. The complainant is a Government of India

Enterprise and established under the Companies Act, 1956. Accused no.1 - M/s. Enbee Infrastructure Ltd. is a limited company incorporated under the Companies Act, 1956 and accused nos.2 to 9 were its Directors / Additional Directors at the relevant time. The accused no.1 approached the complainant for a loan and on its representation an amount of Rs.1170 lakhs came to be sanctioned repayable within a period of ten years. Out of the said sanctioned loan amount a sum of Rs.388.20 lakhs was released to the accused no.1 and towards the repayment of dues for the quarter ending December 2000 and March 2001 the accused had issued post dated cheques to the complainant - company and one of such cheques was cheque no.003415 dated 31/12/2000 for Rs.14,55,750/-. The said cheque came to be dishonoured when submitted for encashment and, therefore, demand notice was issued on 24/5/2001 under registered post A.D. On receiving the said notice the accused did not take any steps to pay the dishonoured cheque amount within 15 days and, therefore, the complaint under Section 138 of the Negotiable Instruments Act, 1881 came to be filed before the learned Metropolitan Magistrate at Bandra.

3. At the first stage the petitioners had approached this Court in Writ Petition No.3127 of 2005 for quashing the complaint and for permanent exemption of the accused from appearance before the trial Court. But the said petition was disposed by this Court on 20/1/2006 by giving liberty to the petitioners to approach the Sessions Court by fling a criminal revision application. The petitioners consequently filed Criminal Revision Application under Stamp No.1951 of 2006 and the same was dismissed by the learned Addl. Sessions Judge on 28/3/2006.

4. In support of the prayer for quashing of the criminal complaint two grounds have been advanced before this Court viz. (a) the petitioner no.1 had resigned from the company on 30/3/2001 and, therefore, he could not be impleaded as an accused as he was not a member of the Board when the dishonoured cheque was issued and (b) even otherwise the complaint filed by the present respondent no.2 did not make out even a prima facie case against the present accused and the complaint did not state that each of them was responsible for and in-charge of the business of the accused no.1 - company. A number of

authorities have been relied upon by the learned counsel for the petitioners in support of these grounds and more particularly the following:

(a) S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & anr. **[(2005) 8 SCC 89]**

(b) S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & anr. **[2007 All MR (Cri) 870 (SC)**

(c) Sabitha Ramamurthy & anr. Vs. R.B.S. Channabasavardhya **[2006 (7) Supreme 168]**

(d) Everest Advertising (P) Ltd. Vs. State, Govt. of NCT of Delhi & ors. **[(2007) 5 SCC 54]**

(e) N.K. Wahi Vs. Shekhar Singh & ors. **[2007 All MR (Cri) 1445 (SC)]**

(f) Saroj Kumar Poddar Vs. State (NCT of Delhi) & anr. **[2007 All MR (Cri) 560 (SC)]**

5. Coming to the first ground that the petitioner no.4 and accused no.8 had resigned from the Board of

the accused no.1 - company with effect from 30/3/2000, it is pertinent to note that in reply to the demand notice under Section 138(b) of the Act, no such plea was taken. However, it appears that in Criminal Revision Application under Stamp No.1951 of 2006 a specific ground to the said effect was taken up. Along with the petition memo a photostat copy of Form No.32 under the Companies act, 1956 has been brought on record at Exhibit D and the same was also placed before the learned Addl. Sessions Judge. The form is dated 17th April 2000 and it states that the petitioner no.4 - accused no.8 resigned as Director of the accused no.1 - company with effect from 30/3/2000. However, this form does not indicate that it was at any time received by the Registrar under the Companies Act and when the learned counsel for the petitioners was called upon to show any receipt or any other proof that it was in fact submitted to the office of the Registrar of Companies, he had no answer and, therefore, this Form No.32 as it is, cannot be relied upon in support of the contentions that the petitioner no.4 - accused no.8 was not the Director of the accused no.1 - company when the dishonoured cheques were issued in favour of the complainant. The purported resignation of other

petitioners i.e. petitioner no.2 with effect from 6/9/2002 and petitioner no.1 with effect from 4/6/2004 is of no consequence for the present purpose. It is, therefore, necessary that the petitioners lead evidence during trial to prove that any one of them or three of them had resigned and were not on the board of the accused no.1 - company when the dishonoured cheque was issued.

6. Now coming to the second issue, the learned counsel for the petitioners relied upon the following observations of the Apex Court in the case of SMS Pharmaceuticals - I (Supra):

> "... Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a

director in such cases."

. In short it is the contention of the learned counsel for the petitioners that none of the petitioners were in charge of and responsible for the conduct of the business of the accused no.1 - company at the relevant time and even otherwise no such statement is made in the complaint filed by the respondent no.2. When the learned counsel for the petitioners was called upon to submit a copy of the balance-sheet for the relevant financial year, he could not do so. He was also asked whether any of the petitioners are professionals like Solicitors, Income Tax Consultants, Auditors or any other experts so as to have been invited to join the Board of the accused no.1 - company and there was no reply and admittedly none of the petitioners belong to this category of professionals / experts having been invited to join the Board. It is also admitted that they are members of the same family and brothers inter se. There is nothing on record to show as at present that none of them is not a full time Director of the accused no.1 - company. If an accused is a full time director of any accused - company, it would be a matter of evidence to decide the issue as to

whether he was in charge of and responsible for the conduct of the business of such a company.

7. Even otherwise in the instant case the complainant - company has averred in its complaint as under:

> "I say that the Accused No.1 is a Limited Company incorporated under the Companies Act, 1956. Accused Nos.2 to 5, 8 and 9 are the Directors and Accused Nos.6 and 7 are the Additional Directors of the Accused No.1. The Accused Nos.2 to 9 are looking into day to day business of the company, i.e. Accused No.1."

The present petitioners are original accused nos.2 to 4 and accused no.8 respectively.

. In the case of N. Rangachari Vs. Bharat Sanchar Nigam Ltd. **[2007 All MR (Cri) 1437 (S.C.)** the relevant statement in the complaint read as under:

> "That accused no.1 is a company incorporated under the Companies Act. Accused Nos.2 and 3

> are its Directors. They are incharge of and responsible to accused No.1 for conduct of business of accused No.1 Company. They are jointly and severally liable for the acts of accused No.1."

Their Lordships of the Supreme Court held that the High Court had rightly come to the conclusion that it was not a fit case for exercise of jurisdiction under Section 482 of Cr.P.C. for quashing the complaint.

Their Lordships further stated as under:

> "... In fact, an advertence to Sections 138 and 141 of the Negotiable Instruments Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the Officers incharge of the affairs of the company to show that they are not liable to be convicted. Any restriction on their power or existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial such a restriction or to show that at the relevant time they were

not incharge of the affairs of the company. Reading the complaint as a whole, we are satisfied that it is a case where the contentions sought to be raised by the appellant can only be dealt with after the conclusion of the trial."

. Regarding invoking of inherent powers of the High Court under Section 482 of Cr.P.C. a three-Judge Bench in the case of Manjula Sinha Vs. State of U.P. and ors. **[2007 AIR SCW 4555]** observed as under:

"As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case, where the entire facts are incomplete and hazy, more so

when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage."

8. Having regards to the law laid down by the Apex Court in the case of N. Rangachari (Supra) and Manjula Sinha (Supra), I am satisfied that the contentions of the petitioners are required to be examined during the trial of the complaint filed by the respondent no.2 and there is no case made out to invoke the inherent powers under Section 482 of Cr.P.C. so as to quash the proceedings in C.C. No.403/SS of 2005. Consequently this petition fails and the same is hereby dismissed. Rule is discharged. Ad-interim order granted earlier stands vacated.

(B.H.MARL